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No. 05-1631

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

TIMOTHY SCOTT, A COWETA COUNTY, GEORGIA, DEPUTY SHERIFF,

Petitioner,

v.

VICTOR HARRIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR CERTIORARI

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ARGUMENT

All police officers in this case unanimously admit that deadly force was used against a fleeing suspect at a time when the suspect admittedly posed no immediate threat to any human life.[1] In short, the extraordinary facts of this case not only authorize, but demand a finding that the defendant officer used excessive force in violation of clearly established precedent under the Fourth Amendment.

The sole issue presented by this appeal is whether the District Court correctly held that Petitioner Scott, who admittedly used deadly force against a fleeing traffic offender who did not pose an immediate threat to human life, is entitled to qualified immunity as a matter of law.[2]

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[1] As noted by the Court of Appeals in the underlying opinion *Harris v. Coweta County*, 433 F.3d 807, 814-815, n. 8 (11th Cir. 2005): "See also Scott's Depo., R. 48 at 157-58, (testifying that ramming Harris' vehicle at high speeds constituted a use of deadly force under the CCSD Deadly Force Policy); Fenninger's Depo., R. 50 at 62-63 (testifying that he gave authorization to make contact with the understanding that he was authorizing the use of deadly force). See also testimony of other Coweta County and Peachtree City officers stating that they considered that ramming a vehicle at 90 mph could constitute a use of 'deadly force.' Reynolds' Depo., R. 49 at 118-119; Yeager's Depo., R. 54 at 59; Kinsey's Depo., R. 51 at 44; Ercole's Depo., R. 47 at 37-40." Further, in Defendants' Statement of Material Facts in support of their Motion for Summary Judgment, the Defendants admitted that at the time of the ramming, there were no other motorists in the area, to wit: "Scott decided to make direct contact with his push bumper, ***while no other motorists were in the area.***" (R. 36 – Stat.. Mat. Facts No. 13) (emphasis added). It is also admitted in the Petition for Writ of Certiorari that "Scott decided to make this contact **while no other motorists appeared to be in the area** . . . " (Petition at 5-6) (emphasis original).

[2] There are two steps to the qualified immunity inquiry. A court must first determine whether the facts alleged, taken in the light most

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Because the law governing the use of force against nonviolent fleeing offenders was clearly established by prior decisions of this Court, and because the application of clearly established law to the facts of this case requires the resolution of disputed facts by a jury, Petitioner is not entitled to qualified immunity as a matter of law and the case should be remanded for trial.

This case is governed by a trilogy of decisions by this Court which gave fair warning that the conduct which occurred in the case was unconstitutional in the year 2001, and those decisions were correctly applied by the courts below. In the seminal case of *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court unanimously ruled that it is a Fourth Amendment violation for a police officer to use deadly force to seize a fleeing felony suspect who "poses no immediate threat" to human life. 471 U.S. at 9-10.

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favorable to the plaintiff, show that the government official's conduct violated a constitutional right. If a violation can be made out, the court must then ask whether the right was clearly established. *See Saucier v. Katz*, 533 U.S. 194 (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). All that is required is that "**in the light of pre-existing law, the unlawfulness must be apparent.**" *Id.* (emphasis added). *See also United States v. Lanier*, 520 U.S. 259, 271 (1997) (law is clearly established where a "general constitutional rule already identified in the decisional law . . . appl[ies] with obvious clarity to the specific conduct in question"). In determining whether the law is clearly established, "the salient question . . . is whether the state of the law [at the time of the alleged conduct] gave [officials] **fair warning** that their alleged [conduct] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (emphasis added).

> . . . The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment . . . The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. **It is not better that all felony suspects die than that they escape.**

Id. (emphasis added). In this case, Victor Harris was a teenage traffic offender, not a fleeing felon, so the Court's reasoning in *Garner* is even more compelling:

> Where the suspect poses no **immediate** threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.

Id. at 9-10 (emphasis added).

Garner's focus upon reasonableness was expanded by *Graham v. Connor*, 490 U.S. 386 (1989), which held that all claims resulting from the use of force against a suspect eluding capture – whether involving deadly or non-deadly force – are to be analyzed under the Fourth Amendment's objective reasonableness standard. 490 U.S. at 388.

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," [Cite omitted] however,

> its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an **immediate** threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *See Tennessee v. Garner*, 471 U.S., at 8-9 (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure").

Id. at 396 (emphasis added). In short, *Graham* requires what was implicit in *Garner*: that the force used be proportional to the threat. Unless the suspect is posing an immediate threat to human life, there is no justification for the use of force which is likely to kill or cause serious injury to the suspect.

The third case of the trilogy, *Brower v. County of Inyo*, 489 U.S. 593 (1989), applied these principles to the use of an automobile as a weapon, holding that a seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied" – regardless of whether the "means intentionally applied" is a bullet, a fist, or a deliberate high-speed collision. 489 U.S. at 597. *Brower* distinguished the case of a deliberate collision amounting to a seizure from the typical automobile negligence claim as follows:

> Violation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, [citations omitted] but the detention or taking itself must be willful. This is implicit in the word "seizure," which can hardly be applied to an unknowing act. . . . Thus, if a parked and unoccupied

> police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. **If, instead of that, the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure.**

Id. at 596-597 (emphasis added). In the case at bar, Victor Harris was rendered a quadriplegic at age 19 by a deliberate collision which was clearly capable of causing death or serious injury. Despite Petitioner's euphemistic characterization that he merely "made contact" with Mr. Harris's vehicle (Petition at 5-6), police videotapes show that Petitioner accelerated rapidly and rammed his patrol car squarely into the rear of Harris' Cadillac, knocking it out of control and sending it airborne off the road and over a steep embankment. (R. 36 – MSJ at Ex. A) This intentional ramming was dramatically more forceful than the hypothetical 'sideswipe' which the Court uses to illustrate its holding in *Brower*.

The record is also clear that when Petitioner radioed his supervisor for permission to ram the vehicle, the supervisor radioed back: "Go ahead, take him out." (R. 50 at 54-55) When asked in his deposition to explain the meaning of "take him out," the supervisor testified that he was authorizing the use of deadly force, whether that consisted of ramming Harris' car at high speed or shooting him with a gun. (R. 50 at 62-63) Every police officer who was deposed in this case – from the sheriff down to the supervisor and the Petitioner himself – admitted under oath that the ramming of Harris' car under the circumstances of this case constituted the use of deadly force, and Respondent has judicially admitted that the ramming

occurred at a time when Harris was driving away from him and there were no other motorists in the immediate area.[3] Whether the ramming constituted deadly or non-deadly force, it was undeniably an intentional termination of Harris' movement and thus a seizure governed by the Fourth Amendment, and Petitioner has not disputed that point.[4] The reasonableness of the seizure is a question for jurors to decide under Fourth Amendment law which has been clearly established since 1989 – the year that *Graham* and *Brower* were decided and four (4) years after the Court's unanimous proclamation in *Garner*. Application of the holdings of this trilogy of landmark Supreme Court decisions to the facts of the instant case clearly provided the Petitioner with "fair warning" that his conduct violated the Fourth Amendment. *Hope*, 536 U.S. at 741.

Petitioner Scott relies heavily on the Court's recent decision in *Brosseau v. Haugen*, 543 U.S. 194 (2004), but *Brosseau* does not alter the foregoing analysis. In its decision below, the Court of Appeals thoroughly addressed *Brosseau* as follows:

> The establishment of these principles distinguishes this case from *Brosseau v. Haugen*. In Brosseau, the Supreme Court reversed the denial of qualified immunity to an officer sued for *Fourth Amendment* violations under *§ 1983* for shooting a suspected felon as he attempted to

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[3] See Footnote 1, *supra*.

[4] "Moreover, the fact that striking the car during the police chase constituted a seizure is not in dispute in this case, as the officer who rammed Harris does not, and could not under the circumstances of this case, contest that he seized Harris." 433 F.3d at 813, fn. 5.

flee in a vehicle, where the officer had arguable probable cause to believe that the suspect posed an imminent threat of serious physical harm to several officers and citizens in the immediate surrounding area.[5] Unlike Harris, Haugen, the suspect in Brosseau, was a suspected felon with a no-bail warrant out for his arrest, with whom Brosseau, the officer, had a violent physical encounter prior to the shooting. Believing that Haugen had entered a Jeep to retrieve a gun, Brosseau broke the windowpane of the Jeep, and attempted to stop Haugen by hitting him over the head with the butt and barrel of her gun. Haugen was undeterred, however, and began to take off out of the driveway, without regard for the safety of those in his immediate vicinity – the three officers on foot (Haugen at his immediate left and two others with a K-9 somewhere

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[5] Footnote in Court of Appeals' opinion: "These facts are not comparable to those in Harris. In the light most favorable to Harris, there is no comparable evidence that Scott had arguable probable cause to believe that Harris posed an immediate risk of death or serious danger to Scott, other officers, or nearby citizens. Harris was being chased for a traffic violation, not a "crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11, 105 S. Ct. 1694. Unlike the situation in Brosseau, the parties were not in close physical proximity nor had they had a one-on-one struggle. In fact, Scott and the other pursuing officers were following Harris from behind in their squad cars. At the time of the ramming, apart from speeding and running two red lights, Harris was driving in a non-aggressive fashion (i.e., without trying to ram or run into the officers). Moreover, unlike Haugen, who was surrounded by officers on foot, with other cars in very close proximity in a residential neighborhood, Scott's path on the open highway was largely clear. The videos introduced into evidence show little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade of the nearby intersections. Finally, Scott issued absolutely no warning (e.g., over the loudspeaker or otherwise) prior to using deadly force." *Harris*, 433 F.3d 807, 819 at fn. 14.

nearby), a woman and her 3-year-old child in a small vehicle parked directly in front of the Jeep and 4 feet away, and two men in a parked vehicle 20 to 30 feet away. In addition, prior to shooting, Brosseau warned Haugen that she would shoot by pointing her gun at the suspect while commanding him to get out of the car, and then using the gun to shatter the glass of the car window and hit Haugen in an attempt to get the keys.

Looking to Garner, the Brosseau Court recognized that its clearly established deadly force rule (i.e., that "it is unreasonable for an officer to 'seize an unarmed non dangerous suspect by shooting him dead' ") was limited by the Court's further instruction that "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596, 598, 160 L. Ed. 2d 583 (quoting *Garner,* 471 U.S. at 11, 105 S. Ct. 1694). Thus, the Brosseau Court held that Garner did not provide a reasonable officer with fair notice of a *Fourth Amendment* violation in "the situation [Brosseau] confronted: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Id. at 600* (emphasis supplied).[6]

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[6] Footnote in Court of Appeals' opinion: "We also note that the Court in *Brosseau* acknowledged that the standard in *Garner* can 'clearly establish' whether or not the use of deadly force is unconstitutional in an 'obvious case.' *Brosseau,* 125 S. Ct. at 599; *United States v. Lanier,* 520 U.S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) ('general constitutional rule already identified in the decisional law . . . applied with obvious clarity to [his conduct].'). It is well-established

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433 F. 3d at 819. Petitioner's reliance on *Brosseau* is misplaced because none of the *Garner* preconditions on the use of deadly force are present. The Fourth Amendment principles set forth in the Supreme Court trilogy of *Garner*, *Graham* and *Brower* apply to this case with "obvious clarity" and give "fair warning" that Petitioner's conduct violated clearly established law when he used deadly force to apprehend a fleeing misdemeanant who posed no immediate threat to the officers or others. *Lanier*, 520 U.S. at 271; *Hope*, 536 U.S. at 741.

The District Court, which was affirmed by the Court of Appeals, properly analyzed the Fourth Amendment claim against Petitioner as follows:

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that 'general statements of the law' are perfectly capable of giving clear and fair warning to officers even where 'the very action in question has [not] previously been held unlawful.' *Lanier*, 520 U.S. at 271 (quoting *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034).... While we need not conclude that the facts in Harris present just such an 'obvious' case to deny Scott qualified immunity, this case may present such circumstances, since the evidence shows that Scott lacked the sufficient probable cause to warrant the use of deadly force. In this way, Harris is more like *Vaughan* than *Brosseau* or the cases cited therein. See *Vaughan*, 343 F.3d at 1333 ('applying Garner in a common-sense way' to hold that a reasonable officer would have known that it was unconstitutional to use deadly force during a high-speed pursuit where the suspect posed no immediate threat of harm to police officers or others). In the cases relied upon in *Brosseau*, the officer had arguable probable cause to believe that the suspects presented an immediate risk of danger to the officers or others. See *Brosseau*, 125 S. Ct. at 600. Without the existence of an immediate threat of harm to the officers or others that could justify the officer's probable cause, the *Garner* rule prohibiting deadly force may apply with 'obvious clarity.'" *Harris*, 433 F.3d 807, 819 at fn.15 (quoting *Lanier*, 520 U.S. at 271) (internal citations omitted).

> [A] fact finder could conclude that when Scott rammed Harris's vehicle, he faced a fleeing suspect who, but for the chase, did not present an immediate threat to the safety of others since the underlying crime was driving 73 miles per hour in a 55 miles-per-hour zone. A jury could also find that Scott's use of force – ramming the car while traveling at high speeds – was not in proportion to the risk that Harris posed, and therefore was objectively unreasonable. [citation omitted] Thus, *a fact issue* remains regarding whether Scott violated the Fourth Amendment by using excessive force to seize Harris.

(Petition at 40a). After determining that there were genuine issues of material fact with respect to the question of whether Scott violated Plaintiff's Fourth Amendment rights, the District Court then discussed whether Scott's conduct violated clearly established law:

> Having concluded that the facts alleged could establish a constitutional violation, the Court now turns to Scott's defense of qualified immunity. In deciding whether Scott is protected by qualified immunity, the Court must determine whether Harris's rights were clearly established – that is, whether it would have been clear to a reasonable officer that Scott's conduct was unlawful. *See Saucier v. Katz*, 533 U.S. 194, 201-202 (2001). "It is well settled that a constitutional right is clearly established only if its contours are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" [citation omitted] (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The Supreme Court, however, has cautioned that in applying the qualified immunity analysis, courts should not be unduly rigid, but rather should see

> if the law gave the defendant "fair warning" that the alleged conduct was unconstitutional. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002). . . .
>
> In the present case, the facts indicate that Scott did not know the underlying charge when he decided to join in the chase or at the time that he rammed the vehicle. . . . ***Although the Court is loath to question the judgment of police officers and recognizes that Defendants' version of the facts is quite different from Plaintiff's version, the Court is compelled to conclude that there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury.***

(Petition at 41a-42a) (emphasis added).

Because the District Court's denial of qualified immunity turned upon the determination that there were facts requiring jury resolution, this case did not qualify for immediate review under *Mitchell v. Forsyth*, 421 U.S. 511 (1985) and its progeny. Under *Johnson v. Jones*, 515 U.S. 304, 319-320 (1995), the determination of whether there are genuine issues of material fact which preclude the defense of qualified immunity is not immediately appealable. Nonetheless, the Court of Appeals accepted jurisdiction of the interlocutory appeal over Respondent's objection and then proceeded to affirm the ruling of the District Court which denied Petitioner's claim of immunity. While it remains the Respondent's position that *certiorari* should not be granted, Respondent respectfully submits that the issue of interlocutory appellate jurisdiction under *Johnson v. Jones* would be fairly included

within the question presented in the event that the Petition were to be granted.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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